Tn Hj Ali bin Hj Abu Bakar v Bank Bumiputra Malaysia Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1–25–124 OF 1999
RAUS J
27 JULY 2003

Labour Law — Employment — Dismissal — Bank manager — Action contravening Treasury Circular and BAFIA — Whether there was condonation in Bank's act of offering the applicant financial assistance programme after charges had been preferred against him — Whether Disciplinary Committee had power to override recommendations of the domestic inquiry panel

The applicant joined the first respondent ('the bank') on 3 April 1978 as 'Eksekutif Pelatih Rendah' and on 27 December 1991, he was dismissed by the bank pursuant to a domestic inquiry of the bank in which he was found guilty of three charges which contravene the Treasury Circular and the Banking And Financial Institutions Act 1989 ('BAFIA'). The Industrial Court found that the applicant was dismissed with just cause and excuse. Hence, the applicant challenged the award. The applicant had based his application on a number of grounds, namely: (1) the Industrial Court's chairman was erroneous as he failed to take into consideration the relevant material evidence in respect of the charges; (2) that there had been condonation on the part of the bank as even when the applicant was facing the charges preferred against him, the bank offered him financial assistance to pursue a degree of Master in Business Administration at Oklahoma University, USA; (3) that there was a jurisdictional error when it failed to decide judiciously and in accordance to the law on whether the Chairman of the Committee had acted in accordance to natural justice when he made a decision to dismiss the applicant, thereby overriding the recommendation of the panel members; (4) the Industrial Court failed to address the issue of whether the extreme punishment of dismissal was warranted in the circumstances of the case and thus, the award was nugatory, contrary to equity, good conscience and the objects and intent of the Industrial Relations Act 1967.

Held, dismissing the application with costs:

(1) Ample evidence was adduced to support the findings of the learned chairman on all the charges, showing a conflict of interest and abuse of position by the applicant (see para 10).

(2) The comment by the learned chairman could not be taken as a contradiction. The learned chairman made a firm finding that there was no condonation in bank's act of offering the applicant financial assistance programme after charges had been preferred against him. After all when the applicant was offered the financial assistance programme, he was only issued with a show cause/charges letter. He had not been proved to have committed the misconduct on the charges. Evidence had yet to be led at the domestic inquiry. Thus, the

bank had in fact acted fairly in not victimizing the applicant by denying him the financial assistance programme, just because of the charges that had yet to be proven (see paras 15–16).

(3) There is no rule of law which says that the punishing authority had no power to override the recommendations of the domestic inquiry panel. The punishing authority may depart from such recommendations as long as the decision of the punishing authority is not based on bias or prejudice. There is also no necessity for the Disciplinary Committee to give the applicant another opportunity to be heard in mitigation before it meted out the punishment of dismissal. From the evidence, the applicant was already given an opportunity to mitigate during the domestic inquiry and the applicant knew that dismissal was one of the punishments that could possibly imposed on him (see para 18).

(4) The learned chairman was right in not interfering into the bank's policy regarding the dismissal of the applicant as he was found guilty of contravening Treasury Circular and the BAFIA. As a senior employee holding the position of a bank manager, they are in special position that requires a higher standard of integrity and responsibility and it is just and desirable for a banking institution to have a strict policy on disciplinary matters especially when it concerns contravention of the BAFIA. The applicant abused his position and acted in conflict of interest to his benefit (see para 19).

[Bahasa Malaysia summary

Pemohon telah bekerja dengan responden pertama ('bank tersebut') pada 3 April 1978 sebagai Eksekutif Pelatih Rendah dan pada 27 Disember 1991, beliau telah dipecat oleh bank tersebut menurut satu siasatan dometik bank tersebut di mana beliau didapati bersalah atas tiga pertuduhan yang bertentangan dengan Pekeliling Perbendaharaan dan Akta Bank dan Institusi-Institusi Kewangan 1989 ('BAFIA'). Mahkamah Perusahaan mendapati bahawa pemohon telah dipecat dengan sebab dan alasan yang adil. Justeru itu, pemohon mencabar award tersebut. Pemohon telah mendasarkan permohonan beliau atas beberapa alasan, iaitu: (1) pengerusi Mahkamah Perusahaan telah tersilap semasa menimbangkan keterangan material yang relevan berkaitan pertuduhan-pertuduhan tersebut; (2) bahawa terdapat pemaafan di pihak bank tersebut meskipun semasa pemohon menghadapi pertuduhan-pertuduhan yang dibuat terhadapnya, bank tersebut telah menawar beliau bantuan kewangan untuk melanjutkan ijazah dalam Sarjana Pentadbiran Perniagaan di Universiti Oklahoma, USA; (3) bahawa terdapat kesilapan kehakiman apabila ia gagal untuk membuat keputusan yang adil dan menurut undang-undang tentang sama ada Pengerusi Jawatankuasa telah bertindak menurut keadilan asasi apabila beliau membuat keputusan memecat pemohon, dengan itu mengatasi cadangan ahli-ahli panel; (4) Mahkamah Perusahaan telah gagal untuk mengutarakan persoalan sama ada hukuman berat pemecatan diwarankan mengikut keadaan kes dan oleh itu, award tersebut adalah tidak

berguna, bertentangan dengan ekuiti, suara hati dan niat Akta Perhubungan Perusahaan 1967.

Diputuskan, menolak permohonan dengan kos:

(1) Keterangan memadai telah dikemukakan untuk menyokong penemuan-penemuan pengerusi yang bijaksana terhadap kesemua pertuduhan, menunjukkan kepentingan bercanggah dan salah guna kedudukan oleh pemohon (lihat perenggan 10).

(2) Komen oleh pengerusi yang bijaksana tidak boleh dianggap sebagai satu percanggaham. Pengerusi yang bijaksana telah membuat penemuan yang kukuh bahawa tidak terdapat pemaafan dalam tindakan bank tersebut menawarkan progam bantuan kewangan kepada pemohon selepas pertuduhan-pertuduhan tersebut dibuat terhadap beliau. Bahkan apabila pemohon ditawarkan program bantuan kewangan tersebut, beliau hanya diberikan surat tunjuk sebab/pertuduhan. Tidak dibuktikan bahawa beliau telah melakukan salah laku berdasarkan pertuduhan-pertuduhan tersebut. Tiada keterangan dikemukakan di siasatan domestik. Oleh itu, bank tersebut pada hakikatnya telah bertindak dengan adil dan tidak menjadikan pemohon mangsa dengan menafikan beliau program bantuan kewangan tersebut, hanya kerana pertuduhan-pertuduhan tersebut belum dibuktikan lagi (lihat perenggan-perenggan 15–16).

(3) Tiada rukun undang-undang yang mengatakan bahawa pihak berkuasa yang menjatuhkan hukuman tidak mempunyai kuasa untuk mengatasi cadangan panel siasatan domestik. Pihak berkuasa yang menghukum boleh menyimpang daripada cadangan tersebut selagi keputusan pihak berkuasan yang menghukum tidak berdasarkan berat sebelah atau prejudis. Tiada keperluan juga untuk Jawatankuasa Tatatertib memberikan pemohon satu peluang lagi untuk didengar dalam mitigasi sebelum ia diberikan hukuman pemecatan. Berdasarkan keterangan, pemohon telahpun diberikan peluang untuk didengar untuk mitigasi semasa siasatan domestik dan pemohon mengetahui bahawa pemecatan adalah salah satu daripada hukuman yang mungkin dikenakan ke atas beliau (lihat perenggan 18).

(4) Pengerusi yang bijaksana adalah betul dengan tidak campur tangan dengan polisi bank tersebut berhubung pemecatan pemohon keran beliau didapati bersalah kerana bertentangan dengan Pekeliling Perbendaharaan dan BAFIA. Sebagai seorang pekerja kanan memegang kedudukan sebagai pengurus bank, mereka dalam kedudukan khas yang menghendaki piawai integriti dan tanggungjawab yang lebih tinggi dan ia adalah adil dan perlu untuk satu institusi perbankan mempunyai polisi ketat berhubung perkara-perkara tatatertib terutama jika ia bercanggah dengan BAFIA. Pemohon telah menyalahgunakan kedudukan beliau dan bertindak untuk kepentingan yang bercanggah yang memihak kepadanya (lihat perenggan 19).]

Notes

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 849–873.

Legislation referred to

Banking And Financial Institutions Act 1989 s 115(1)
Industrial Relations Act 1967

S Devi (P Kuppusamy & Co) for the applicant.
Suzleena (Skrine) for the first respondent.

Raus J:

[1] This is an application by the applicant for orders of certiorari and mandamus in respect of Industrial Court Award No 574 of 1999 handed down on 27 October 1999. In the said award, the Industrial Court found that the applicant was dismissed with just cause and excuse.

[2] Briefly, the factual background that led to this application by the applicant are as follows.

[3] The applicant joined the first respondent ('the bank') on 3 April 1978 as 'Eksekutif Pelatih Rendah'. On 27 December 1991, he was dismissed by the bank. At the time of his dismissal, he was a branch manager of Taman Sri Gombak branch. The applicant's dismissal was pursuant to a domestic inquiry of the bank in which he was found guilty of three charges, which reads as follows:

> CHARGE NO 1
>
> That you had abused your position as a Branch Manager and brought your personal interest into conflict with your duties as such, when you arranged or used the arrangement for the internal funds transfer of RM10,000 from Current Account No 3933–46 in the name of Abdullah bin Mohd Dom into Current Account No 3333–77 favouring yourself, vide Debit Advice No 192516 dated 29 July 1992, after the creation of the overdraft in the said customer's current account on the same date.
>
> You had, therefore, contravened the Treasury & Investment Banking Circular No 88/47 (Per No 381): Code of Ethics dated 29 December 1988.
>
> CHARGE NO 2
>
> In furtherance to Charge No 1 above, you had, by arranging or causing the arrangement for the internal funds transfer of RM10,000 into your Current Account No 3333–77, thereby received or agreed to receive monies from Abdullah bin Mohd Dom for your personal precuniary benefit or advantage for procuring for the said Abdullah bin Mohd Dom the overdraft facility of RM25,000 from the Bank.
>
> You had, therefore, contravened Section 115(1) of the Banking And Financial Institutions Act 1989.

CHARGE NO 3

That you had acted irresponsibly, when you delegated your discretionary approving authority in respect of granting temporary overdraft without facility, to the Deputy Branch Manager, Encik Alias bin Mokhtar, resulting in the latter granting temporary overdraft to the following account holders, exceeding the Branch's aggregate limit of RM2,000.

You had, therefore, breached Item 9–5–2 of General Circular 43, Part 1 dated 19 July 1992.

[4] The applicant then made a representation to the Industrial Relation Department that he had been dismissed without just cause or excuse. As the Director General of the Industrial Relation, could not resolve the dispute, the Minister of Human Resources referred the matter to the Industrial Court for an award. As stated earlier, the Industrial Court found that the applicant was dismissed with just cause and excuse. Hence, the applicant is now challenging the award.

[5] The applicant has based his application on a number of grounds. In gist, the applicant's ground may be summarized as follows:

(1) The Industrial Court erred in law in concluding that the applicant was guilty of the charges and that the said decision is perverse, irrational and illegal.

(2) The Industrial Court had committed a serious error of law by misconstruing and/or misstating the law as to the doctrine of condonation and, thus, the award is illegal and a nullity.

(3) The Industrial Court committed a jurisdictional error when it failed to decide judiciously and in accordance to the law on whether the Chairman of the Committee had acted in accordance to natural justice when he made a decision to dismiss the applicant, thereby overriding the recommendation of the panel members.

(4) The Industrial Court failed to address the issue of whether the extreme punishment of dismissal was warranted in the circumstances of the case and thus, the award is nugatory, contrary to equity, good conscience and the objects and intent of the Industrial Relations Act 1967.

[6] In deciding cases of this nature, I am always guided by the principle that the jurisdiction of high court is a supervisory in nature. This court is not entitled to act as an appellate court. With that principle in mind, I am now proceed to consider the grounds as advanced by the appellant.

(1) The Industrial Court's decision is perverse, irrational and illegal

[7] It is submitted by the appellant that the Industrial Court's decision is erroneous as he failed to take into consideration the relevant material evidence in respect of the charges. The applicant had in fact, itemized the evidence which he claims the Industrial Court had failed to consider. But, it is trite that the written award of the Industrial Court does not allow in

practical terms make reference to every piece of evidence whether orally or documentary, that was adduced in court. What is important for me to consider is, whether the findings of the Industrial Court is well supported by evidence adduced in the course of the trial and that he has not taken irrelevant matters into consideration in making the award. In this case, the learned chairman concluded that the applicant was guilty of the three charges. With regard to charges Nos 1 and 2, the learned chairman held as follows on p 10 of the award:

> The claimant had, as evidence disclosed, chosen to disregard these prohibitions. His actions had clearly breached Banking And Financial Institutions Act 1989 ('BAFIA') and the circumstances in which he went about the transactions showed conflict of interest and an abuse of his position in the bank. The claimant transferred to his account money owed and belonged to his wife from a customer dealing in car rental business involving his wife's car. The account was a joint account of the claimant and his wife. The customer was a debtor of the claimant's wife at the time his loan application was approved by the Branch Loan Committee ('BLC') chaired by the claimant.

[8] The learned chairman went on to conclude on p 15 of the award by saying as follows:

> The claimant failed to disclose his indirect financial interest in his wife's business transaction with a customer of the bank to his superior and breached item 1(a) of a circular by sitting on the BLC which approved the loan for the bank's customer indebted to the claimant's wife is clearly a case of conflict of interest. The claimant was a guarantor of his wife's car loan for a car used in the customer's car rental business. The transfer of fund from customer's loan facility to the claimant's account is an abuse of the claimant's position as a Branch Manager of the bank. It has infringed s 62(1)(a) of BAFIA.

[9] In respect of Charge No 3, the learned chairman held on p 15 of the award as follows:

> The claimant knew his Deputy Branch Manager had granted temporary overdraft in excess of the authorized limit and had not taken measure to stop the malpractrice and was deemed to have delegated the authority to his deputy.

[10] Thus, the issue now is whether the findings of the learned chairman is perverse, irrational and illegal. With respect I am unable to hold as such. To me, there is an ample evidence to support the findings of the learned chairman. With regard to the first charge, the evidence clearly shows that the applicant had contravened the Treasury and Investment Banking Circular No 88/47; Code of Ethics dated 29 November 1988 by arranging or causing to be arranged the transfer of funds from the account of one customer ('COW7') to his personal account. Ample evidence was adduced to show this conflict of interest and abuse of position. Evidently, COW7 was indebted to the applicant's wife, as a result of a transaction entered into between COW7 and the applicant's wife whereby COW7 was to pay rental to the applicant's wife for the use of her car. The car in question was under hire purchase and the principal borrower was the applicant's wife, whilst the applicant was the guarantor. By transferring of funds from COW7's account to the joint account of the applicant and his wife, the wife was placed in a

position of ability to meet her obligation under hire-purchase agreement and thereby, the applicant would not be liable as a guarantor. No doubt, consent to transfer or instruction to transfer was obtained from COW7 but the allegation against the applicant was not that he failed to obtain a proper authorization but that he had arranged or caused to have arranged such transfer. In any event, there was evidence led to show that the instruction from COW7 was procured by the applicant. COW7 had actually testified that although the signature on the instruction letter was his, he actually signed a blank letter. Further of importance, is the evidence led to show that the transfer of funds was done on a loan sum that was granted by the bank to COW7 and his wife and therefore, the consent to the transfer of the funds should have also been signed by COW7's wife since she was co-owner of the loan sum.

[11] The second charge levelled against the applicant is for contravening s 115(1) of BAFIA. Section 115 of BAFIA expressly provides that no officer of a licensed institution shall, directly or indirectly, asks for or receive, or consent or agree to receive, any gift, money, property etc whether for his own personal benefit or advantage, or for the benefit and advantage of other person from another person other than from the institution, for procuring or endeavouring to procure for any person inter alia, any credit facilities from that institution. From the evidence, it is clear that the applicant had obtained a benefit in return for procuring a facility for COW7. The applicant obtained a consent to transfer funds from the loan account to his personal account. COW7 has made a sworn statement that after the loan was approved he had to wait eight months before it was disbursed into his account and that he had to make many enquiries to the applicant regarding the same, and that the applicant in return queried him about the money owed to the applicant's wife. COW7's sworn statement also confirmed that it was only after he signed the blank letters that the loan amount was released. To me, this undisputed evidence is in itself sufficient to prove that the applicant arranged to obtain a pecuniary benefit for himself, either directly or indirectly, in return for procuring the loan of COW7.

[12] With regard to the third charge, the charge against the applicant was that he had acted irresponsibly, when he delegated his discretionary approving authority in respect of granting temporary overdraft facility to the deputy branch manager resulting in the latter granting temporary overdraft to certain account holders, exceeding the branch's aggregate limit of RM2,000 and had thereby break Item 9–5–2 of General Circular 43 Part 1 dated 19 July 1992. No doubt from the evidence that arose in the course of trial, shows that the deputy general manager acted on his own accord in approving the loan in question, and that he admitted that the applicant had not asked him to grant the facilities, there is sufficient evidence to support the learned chairman's findings that the charge against the applicant had been sufficiently proven. The applicant, in the course of giving evidence in cross-examination, did not dispute the fact that, despite knowing the deputy branch manager's action in granting the facilities in excess of his authority, failed to take any action to stop the malpractice. Accordingly, the learned

chairman found that the applicant was deemed to have delegated the authority to his deputy.

[13] Based on the above, it cannot be said that there is no evidence to support the findings of the Industrial Court.

(2) Misconstruing and/or misstating the doctrine of condonation

[14] The complaint by the applicant is that the learned chairman had misconstrued or misstated the law as to the doctrine of condonation. Basically, the applicant is saying that there has been condonation on the part of the bank when the applicant facing the charges preferred against him, was offered a financial programme to pursue a degree of Master in Business Administration at Oklahoma University, USA. With regard to this issue, the learned chairman held as follows:

> Although the court found that, in the circumstances, there was no condonation by the Bank, there were weaknesses in handling the case against the claimant The Bank could not make up its mind and was indecisive. It even offered the claimant financial assistance programme after charges had been preferred against him for misconduct of a serious value. It must be something for the benefit of an employer in mind to offer an employee financial assistance to further his academic or professional qualification. The bank's generosity, if I may call it, is not only superfluous but unusual.

[15] It is submitted by the applicant that the concluding comment by the learned chairman is in total contradiction with his finding that the bank's act of offering the applicant financial assistance programme after charges had been preferred against him is not a condonation.

[16] To me, the comment by the learned chairman could not be taken as a contradiction. The learned chairman made a firm finding that there was no condonation. I have no reason to disagree. After all when the applicant was offered the financial assistance programme, he was only issued with a show cause/charges letter. He had not been proved to have committed the misconduct on the charges. Evidence had yet to be led at the domestic inquiry. Thus, the bank had in fact acted fairly in not victimizing the applicant by denying him the financial assistance programme, just because of the charges that had yet to be proven.

(3) The Industrial Court committed jurisdictional error

[17] The applicant's complaint under this ground is that the Industrial Court had failed to act in accordance to the law when it held that the Discipline Committee could depart from the Bank's Panel of Domestic Inquiry's recommendation. It is not disputed that the said panel did not recommend the punishment of dismissal. The decision to dismiss was decided by the Disciplinary Committee. Thus, it is submitted for the appellant that the Industrial Court erred in law in concluding that the Disciplinary Committee was empowered to enhance the applicant's punishment and meted out the punishment of outright dismissal. It is further submitted that the Industrial Court had failed to take into account

of the fact that the applicant was denied an opportunity to be heard in mitigation before the Disciplinary Committee meted out the punishment of outright dismissal as the punishment itself involves a further decision making process.

[18] On this issues, I am of the view that there is no rule of law which says that the punishing authority had no power to override the recommendations of the domestic inquiry panel. The punishing authority may depart from such recommendations as long as the decision of the punishing authority is not based on bias or prejudice. In this case, no such evidence was led by the applicant before the Industrial court to show that the Disciplinary Committee was bias or prejudice against the applicant. There is also no necessity for the Disciplinary Committee to give the applicant another opportunity to be heard in mitigation before it meted out the punishment of dismissal. From the evidence the applicant was already given an opportunity to mitigate during the domestic inquiry and the applicant knew that dismissal was one of the punishments that could possibly imposed on him. Accordingly, I cannot agree to the submission of the applicant that the Industrial Court had failed to act in accordance to the law when it held that the Disciplinary Committee could depart from the panel's recommendation.

(4) The punishment of dismissal in contrary to equity, good conscience object and intent of the Industrial Relations Act 1967

[19] Was the punishment of dismissal justified? The applicant submitted that on the proven facts of misconduct, the punishment of dismissal was harsh and not appropriate. However, the learned chairman did not think so. To me, the learned chairman was right in not interfering into the Bank's policy regarding the dismissal of the applicant as he was found guilty of contravening Treasury Circular and the BAFIA. The applicant was a senior employee holding the position of a bank manager which carries a responsibility that is not to be taken lightly. The applicant abused his position and acted in conflict of interest to his benefit. In this respect, we must always be reminded that bank officers are in special position that requires a higher standard of integrity and responsibility and it is just and desirable for a banking institution to have a strict policy on disciplinary matters especially when it concerns contravention of the BAFIA.

Conclusion

[20] On the records before this court, I am of the view that there is no merit in this application. Accordingly, the application is dismissed with costs.

Application dismissed with costs.

Reported by Sally Kee Seok Meng